L.W. OVERLY COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-39 Decided August 11, 1988

Petition for discretionary review of a decision of Administrative Law Judge Joseph E. McGuire affirming issuance of cessation order and proposed assessment of civil penalties. CH 4-13-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

   Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(a)(3) (1982), to issue a cessation order.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

   The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

APPEARANCES: A. C. Scales, Esq., Greenburg, Pennsylvania, and Steven D. Overly, Esq., Littleton, Colorado, for appellant; Henry R. Shaffer, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The L.W. Overly Coal Company and L.W. Overly (hereinafter jointly referred to as petitioner or "Overly") have petitioned for discretionary

review of a decision dated September 28, 1987, by Administrative Law Judge Joseph E. McGuire, rendered after a hearing. 1/ The decision of Judge McGuire upheld cessation order (CO) No. 80-1-69-1, on the ground the evidence supported issuance of the CO for failure to timely abate violation No. 4 of Notice of Violation (NOV) No. 80-1-69-4 and, further, sustained the resulting civil penalty assessment of $22,500 on the basis it was required by law.

Petitioner was the operator of an 11.3-acre surface coal mining operation (strip mine) located in Mount Pleasant Township, Westmoreland County, Pennsylvania, permit No. 260-15. On February 12, 1980, Office of Surface Mining Reclamation and Enforcement (OSMRE) Reclamation Specialist John J. Stanko conducted an inspection of Overly's strip mine operation. As a result of his inspection, Stanko issued a NOV No. 80-1-69-4 (Exh. B), pursuant to the provisions of section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a)(3) (1982), alleging that petitioner had violated the implementing regulations in four respects. The fourth of these violations, the only infraction which is at issue herein, alleged that Overly violated the regulations at 30 CFR 715.17(a), that is, petitioner failed to pass all surface drainage from the areas which had been disturbed by its surface coal mining and reclamation operations through a sedimentation pond or a series of sedimentation ponds before such drainage left the permit area. Overly was given until February 26, 1980, to abate the violation.

On March 7, 1980, Stanko reinspected Overly's minesite and extended the time for abatement of the violation until March 27, 1980, because of weather conditions (Exh. C). Again on March 27, 1980, the OSMRE reclamation specialist conducted a followup inspection of Overly's minesite and extended the time for abatement of the violation to April 16, 1980 (Exh. D). On April 16, 1980, Stanko conducted his third followup inspection and extended the time for compliance until May 13, 1980, noting that: "[the] sedimentation pond cannot be installed within [the] permitted area until more backfilling is done. Backfilling of pit [has been] delayed due to weather conditions" (Exh. E). On May 13, 1980, Stanko again reinspected Overly's minesite and observed that petitioner had not installed the sedimentation pond as required by the NOV. Because the violative condition had not been abated within 90 days, as required by the law, Stanko issued and served upon Overly a failure-to-abate CO No. 80-1-69-1 (Tr. 23; Exh. G).

On May 19, 1980, Stanko again visited petitioner's minesite after having been so requested by Overly's counsel in order to terminate the NOV and CO in view of Overly's assertion that the required sedimentation pond had been constructed (Tr. 47-48). Stanko conducted a followup inspection of the site and observed that petitioner had placed 4 pipes, each 3 inches in diameter, on the ground parallel to the drainage way with large rocks to

1/ By order dated Dec. 9, 1987, this Board granted the Overly petition for discretionary review pursuant to 43 CFR 4.1270 and established a briefing schedule.

secure them in place (Tr. 48). However, no dike and no sedimentation pond had been constructed (Tr. 48). Hence, the inspector found the NOV was not abated (Tr. 48). Further inspections on June 20, 1980, and August 14, 1980, disclosed the NOV had still not been abated (Tr. 49-51). Indeed, at the time of the latter inspection a storm had washed the pipes over the edge of the slope and off the disturbed area into a drainage (Tr. 54-56; Exh. R-2). Backfill had washed off the disturbed area (Tr. 56; Exhs. R-7 and 9). The testimony indicated this drainage into which the pipes and erosion were carried was off the permit (Tr. 70).

Stanko conducted his final followup inspection on September 3, 1980, and observed that an acceptable sedimentation pond had been constructed (Tr. 53, 60; Exh. L). After his inspection Stanko terminated CO No. 80-1-69-1 (Exh. M) and NOV No. 80-1-69-4 (Exh. N), as it related to Violation No. 4.

On March 18, 1982, a $22,500 civil penalty assessment was proposed for failure-to-abate CO No. 80-1-69-1. On May 25, 1984, as a result of a conference requested by Overly, an assessment conference report confirming the $22,500 assessment was issued. On June 4, 1984, Overly filed a petition for review of the CO and the assessment, failing however to pay the $22,500 for deposit into escrow pending the final decision, as required by the applicable statute and regulations. On June 27, 1984, Overly prepaid the $22,500 proposed civil penalty to the Department's Office of Hearings and Appeals (OHA). On August 16, 1984, Judge McGuire dismissed Overly's June 4, 1984, petition for review of CO No. 80-1-69-1, with prejudice, because Overly's failure to prepay the proposed civil penalty assessment had deprived OHA of jurisdiction to review the proposed civil penalty assessment. On August 27, 1984, Overly filed with this Board a petition for discretionary review of Judge McGuire's August 16, 1984, order of dismissal.

On December 6, 1984, the Board entered an order denying Overly's August 27, 1984, petition for review, noting that the timely prepayment of a proposed civil penalty assessment is required by the provisions of section 518(c) of SMCRA, 30 U.S.C. | 1268(c) (1982), 30 CFR 723.19(a), and 43 CFR 4.1152(b), and that a party's failure to timely prepay results in a waiver of all rights to contest the penalty and deprives OHA of jurisdiction. 43 CFR 4.1152(c). On June 19, 1985, Overly filed a petition with the Board in which it requested that the $22,500 it had previously paid into escrow be refunded. On September 30, 1985, the Board treated this as a request for reconsideration and entered an order denying Overly's request for reconsideration of the December 6, 1984, order. On October 2, 1986, Overly petitioned the Secretary of the Interior renewing his request that the $22,500 held in escrow be refunded. By order dated November 6, 1986, the Director, OHA, determined that Overly's October 2, 1986, petition would be treated as a request for Secretarial review of the Board's December 6, 1984, and September 30, 1985, orders.

On June 29, 1987, the Secretary issued a decision reversing Judge McGuire's order of dismissal dated August 16, 1984, and remanding the case to OHA for a hearing and decision on the merits. In Re L.W. Overly Coal Co., 94 I.D. 349 (1987). Subsequently, the hearing in this case was held before Judge McGuire in Pittsburgh, Pennsylvania, on July 14, 1987.

On appeal from Judge McGuire's decision reached after the hearing, appellant contends the Department is bound by the consent decision of Administrative Law Judge Sheldon L. Shepherd dated June 16, 1981 (Exh I), which dismissed with prejudice Overly's petition for review of NOV No. 80-1-69-4 and set the appropriate civil penalty assessment for the four violations cited therein at $460. Appellant asserts that Judge Shepherd's decision precludes OSMRE from imposing additional civil penalty assessments. Appellant further argues that it was impossible to construct a sedimentation pond before the removal of the coal from the area underlying the site where the sedimentation pond was to be constructed because coal removal by necessity would have destroyed the sedimentation pond. Additionally, appellant asserts the CO and civil penalty are invalid because they were issued in the name of L. W. Overly Coal Company and there is no such entity.

The appeal presents two essential issues. First, whether the CO was properly issued, i.e., whether violation No. 4 of the NOV (failure to route drainage from the disturbed area through a sedimentation pond) was abated during the 90-day period allowed for abatement in the NOV itself and the subsequent extensions. If the first question is answered in the affirmative, the second issue is whether the civil penalty of $22,500 was properly assessed. This latter question hinges on whether the violation was abated within less than 30 days after the CO was issued.

[1] The evidence supports the finding of the Administrative Law Judge that petitioner had not, by the deadline set forth in the NOV and extensions thereof, constructed a sedimentation structure which would comply with the requirement that all runoff from the disturbed area be passed through a sedimentation pond prior to leaving the permit area. This requirement of the regulations at 30 CFR 715.17(a) was expressly stated in the NOV (Exh. B, Violation No. 4 of 4). The record establishes that runoff has, on at least one occasion prior to construction of the sedimentation pond, left the disturbed area and proceeded off the permit into the drainage. A violation of the sedimentation pond requirement is established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond, and that it will leave the permit area. Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 95 I.D. 75 (1988). It is clear from the testimony of inspector Stanko recited previously that no sedimentation pond was constructed by the May 13, 1980, deadline for abating the violation in the NOV. 2/ Indeed, it is clear from the record that the sedimentation pond was not built until sometime between the August 14, 1980, and September 3, 1980, inspections. Where inspection discloses that a violation has not been abated within the time allowed in the NOV and any extensions thereof, OSMRE is required by the terms of section

2/ Although petitioner Overly testified you can't place a pond where you still have to blast and remove coal (Tr. 113, 117), he acknowledged that coal in the pond area was stripped in 1978 or 1979 and that backfilling is the last step (Tr. 125). Inspector Stanko testified that from the time of issuance of the NOV the petitioner was backfilling rather than mining (Tr. 50).

521(a)(3) of SMCRA, 30 U.S.C. | 1271(a)(3) (1982), to issue a CO. Grays Knob Coal Co. v. OSMRE, 98 IBLA 171 (1982). Accordingly, we must affirm the decision of the Administrative Law Judge upholding issuance of the CO.

[2] Appellant has also challenged the validity of the $22,500 civil penalty assessment. Again, we must agree with Judge McGuire that the assessment was appropriate. Section 518(a) of SMCRA, 30 U.S.C. | 1268(a) (1982), governs the assessment of civil penalties for violations cited in a NOV. Thus, section 518(a) provides that the Secretary "may" assess a civil penalty of not more than $5,000 with respect to any permittee "who violates any permit condition or who violates any other provision of this title." It also provides, however, that when such violation leads to the issuance of a cessation order, a civil penalty "shall" be assessed. The statute sets forth certain factors that should be considered "[i]n determining the amount of the penalty." 30 U.S.C. | 1268(a) (1982). These factors are implemented by the point system and conversion table described, respectively, in 30 CFR 723.13 and 723.14. In addition, 30 CFR 723.16(a) provides that the Director of OSMRE "may waive the use of formula * * * to set the civil penalty, if * * * taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust." In a proceeding to review the proposed assessment of a civil penalty, an Administrative Law Judge and the Board, likewise, have the authority to recalculate the assessment using the point system and conversion table or to waive use of the civil penalty formula. 43 CFR 4.1157(b)(1) and 4.1270(f). The civil penalty for the NOV which was the subject of the consent decision entered by Administrative Law Judge Shepherd on June 16, 1981 (Exh. I) constituted the culmination of this process.

However, in addition to civil penalties assessed for violations cited in a NOV, section 518(h) of SMCRA mandates assessment of a civil penalty for the failure to abate a violation within the time allowed. Thus, section 518(h) of SMCRA states that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 1271(a) of this title within the period permitted for its correction * * * shall be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues." (Emphasis added.) 30 U.S.C. |1268(h) (1982); see 30 CFR 723.15(b). The amount of the penalty is limited to 30 days or $22,500. 30 CFR 723.15(b)(2). The point system and conversion table are not applicable to this mandatory assessment of civil penalties. Likewise, no authority exists for either OSMRE, an Administrative Law Judge, or the Board to waive such an assessment. As we said in Peabody Coal Co. v. OSMRE, 90 IBLA 186, 194, 93 I.D. 1, 5 (1986), which also involved the assessment of civil penalties pursuant to section 518(h) of SMCRA and 30 CFR 723.15(b) in the case of a failure-to-abate CO: "[W]e find no authority in the statute and regulations for consideration of mitigating factors such as inability to comply [see 30 CFR 722.17(c)] or good faith effort of the permittee to comply [see 30 CFR 723.13(b)(4)] in assessing the statutory minimum penalty." The statute and regulations, in fact, preclude the Board from waiving or reducing the statutory minimum failure-to-abate civil penalty. See Grays Knob Coal Co., v. OSMRE, supra. The civil penalty at issue in this appeal assessed for failure to abate the violation within the time allowed, unlike the civil penalty for the initial violation itself which was the subject of

the proceeding before Administrative Law Judge Shepherd, falls into the latter category. Hence, the decision of Judge McGuire upholding the penalty in the amount of $22,500 must be affirmed.

Appellant also challenges the validity of the CO and resulting civil penalty on the ground the CO was issued in the name of "L. W. Overly Coal Company" as operator. Appellant contends he has always operated either under his own name or the corporate name of "L. W. H. & C. Corporation" (Tr. 114). It is clear from the record, however, that L. W. Overly was in fact the operator of the permitted coal mine in question and that he had actual notice of the NOV, the CO, and the civil penalty. Indeed, counsel for OSMRE has submitted with its brief a copy of a letter of April 17, 1980, from petitioner requesting a conference on the civil penalty assessment for the NOV signed by "L. W. Overly, Pres., L. W. Overly Coal Co." No prejudice has been shown from the fact the CO was issued in the name of L. W. Overly Coal Company and, hence, petitioner's argument must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Joseph E. McGuire is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge